Supreme Court, U.S.
FILED

No. 02-

021773 JUN 02 2003

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DO GEUN OH, *et al.*,

Petitioners,

v.

MITSUI & CO., LTD., *et al.*,

Respondents.

SUK YOON KIM, on behalf of himself and all others similarly situated,

Petitioner,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES, LTD., *et al.*,

Respondents.

SA SON SIN,

Petitioner,

v.

MITSUI & CO., LTD., *et al.*,

Respondents.

JAE SIK CHOE,

Petitioner,

v.

NIPPON STEEL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEVE W. BERMAN
Counsel of Record
ERIN K. FLORY
HAGENS BERMAN LLP
1301 Fifth Ave., Ste. 2900
Seattle, WA 98101
(206) 623-7292

KEVIN P. RODDY
HAGENS BERMAN LLP
700 S. Flower St., Ste. 2940
Los Angeles, CA 90017-4101
(213) 330-7150

Counsel for Petitioners

130 pp

QUESTION PRESENTED

Whether, in nullifying a state statute that provided an opportunity for relief against local corporations affiliated with foreign companies that enslaved foreign nationals to labor under inhumane conditions during World War II, the Ninth Circuit erred by fashioning a novel, unprecedented and inflexible rule that precludes any state action that somehow "relates to war," and, by doing so, usurped this Court's own test for determining whether a state statute intrudes on the federal government's "foreign affairs" powers.

Alternatively, whether in applying the federal foreign-affairs powers to all things somehow "related to war," the Ninth Circuit subverted this Court's foreign-affairs precedent and in so doing unleashed a novel and dangerous precedent that can wrongfully extinguish the rights of private litigants suing other private litigants.

PARTIES TO THE PROCEEDING

This Petition is filed on behalf of plaintiffs Suk Yoon Kim, Jae Sik Choe, Sa Son Sin, Ko Geun Oh, Eugn Chang Lee and Yong Hae Lee. Petitioners are Korean nationals who were shipped to Japan during World War II and forced to work under inhumane conditions for various private corporations, all of whom now are or have affiliates or successors doing business in the State of California.

The defendant corporations in *Kim*[1] are: Ishikawajima Harima Heavy Industries Company, Ltd., IHI, Inc., Sumitomo Heavy Industries Ltd., and Sumitomo Heavy Industries (USA), Inc.

The defendant corporations in *Choe*[2] are: Nippon Steel Corporation, Nippon Steel U.S.A., Inc., Mitsubishi Heavy Industries, Ltd, Mitsubishi Heavy Industries America, Inc.

The defendant corporations in *Sin*[3] are: Mitsui & Co., Ltd., Mitsui & Co. (USA), Mitsui Engineering & Shipbuilding Co., Ltd, and Paceco Corporation.

And the defendant corporations in *Oh, Lee and Lee*[4] are: Mitsui & Co., Ltd., Mitsui & Co. (USA), Mitsubishi Corporation, Mitsubishi International Corporation, Mitsubishi Heavy Industries America, Inc., Mitsubishi Heavy Industries America, Inc., Mitsubishi Materials Corporation, Mitsubishi Materials USA Corporation, Nippon Steel Corporation, Nippon Steel U.S.A., Showa Denko America, Inc., and Showa Kogyo.

---

1. *Kim v. Ishikawajima Harima Heavy Indus. Co., Ltd.*, No. CV-99-05303-VRW.

2. *Choe v. Nippon Steel Corp., et al.*, No. CV-99-05309-VRW.

3. *Sin v. Mitsui & Co., Ltd., et al.*, No. CV-00-03242-VRW.

4. *Oh, et al. v. Mitsui & Co., Ltd., et al.*, No. CV-00-03752-VRW.

Petitioners filed their respective complaints in California state courts, which Defendants removed to federal district court. Subsequently, the Judicial Panel on Multidistrict Litigation ("MDL Panel") transferred the cases to Judge Walker in the Northern District of California. Eventually, some 31 cases brought by former Allied prisoners of war and Korean, Chinese, Dutch and Filipino civilian internees were consolidated before Judge Walker and dismissed in a series of orders issued during 2000 and 2001. The United States Court of Appeals for the Ninth Circuit affirmed all of the dismissals in a single decision that is the subject of this Petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	vii
TABLE OF APPENDICES	xii
OPINIONS BELOW	1
JURISDICTION	1
PERTINENT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
A. Petitioners were enslaved and treated inhumanely by the defendant private corporations	3
B. Nature of the Case and Proceedings Below	5
REASONS FOR GRANTING THE PETITION	8
A. The Ninth Circuit's New Rule – That Allowing Lawsuits Against Foreign Corporations Is Impermissible Under The "Foreign Affairs" Doctrine – Is A Radical Expansion Of The Doctrine And An Unprecedented Intrusion On State's Rights	8

Contents

Page

1. A state can allow private claims against a local corporation for misconduct committed by a foreign affiliate without intruding on federal authority over foreign affairs 9

   a. The foreign-affairs doctrine is rarely invoked to invalidate state action under this Court's decisions 9

   b. Under *Clark* and *Zschernig*, lower courts only invalidate state laws that coerce a specific foreign government 12

   c. Section 354.6 coerces no foreign government and seeks relief only for private misconduct 16

2. The wartime context of Petitioners' state-law claims does not render them unconstitutional 21

   a. The court of appeals wrongly displaced this Court's foreign-affairs analysis to find that section 354.6 intruded on foreign affairs .. 22

   b. The court of appeals wrongly deemed immaterial that the U.S.'s resolution of wartime claims against Japan did not address Korean nationals' claims 28

Cited Authorities

Page

B. The Gravity of The Injuries And Misconduct Compel Review of The Ninth Circuit's Decision 28

C. This Court's Impending *Low* Decision Will Not Address The Court's Error in This Case 29

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Page

CASES

America Insurance Ass'n v. Low,
154 L. Ed. 2d 768, 123 S. Ct. 817 (2003) 3, 29, 30

Brown v. Wright,
137 F.2d 484 (4th Cir. 1943) 19

Clark v. Allen,
331 U.S. 503 (1947) ..... *passim*

Crosby v. National Foreign Trade Council,
530 U.S. 363 (2000) 15

Gerling Global Reinsurance Corp. of America v. Quackenbush,
2000 U.S. Dist. Lexis 8815 (E.D. Cal. June 9, 2000), *rev'd in pertinent part*, 240 F.2d 739 (9th Cir. 2001) 14, 15

Gerling Global Reinsurance Corp. v. Low,
240 F.3d 739 (9th Cir. 2001), *cert. petition granted sub nom, Am. Ins. Ass'n v. Low*, 154 L. Ed. 2d 768, 123 S. Ct. 817 (2003) ..... *passim*

Highland v. Russell Car & Snow Plow Co.,
279 U.S. 253 (1929) 19

International Ass'n of Indep. Tanker Owners v. Locke,
148 F.3d 1053 (9th Cir. 1998), *rev'd on other grounds, sub nom*, 529 U.S. 89 (2000) 9

Cited Authorities

Page

Kawakita v. United States,
343 U.S. 717 (1952) 19, 20

Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione,
937 F.2d 44 (2d Cir. 1991) 26

Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione,
739 F. Supp. 854 (S.D.N.Y. 1990) 26

Linder v. DOD,
133 F.3d 17 (D.C. Cir. 1998) 26

Linder v. Portocarrero,
963 F.2d 332 (11th Cir. 1992) 25, 26

National Foreign Trade Council v. Natsios,
181 F.3d 38 (1st Cir. 1999), *aff'd on other grounds sub nom, Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) 15, 16

New York Times Co. v. New York Comm'n on Human Rights,
41 N.Y.2d 345, 361 N.E.2d 963 (1977) 16

Springfield Rare Coin Galleries, Inc. v. Johnson,
115 Ill. 2d 221, 503 N.E.2d 300 (1986) 16

Tayyari v. New Mexico State Univ.,
495 F. Supp. 1365 (D.N.M. 1980) 15, 27

Trojan Tech. v. Pennsylvania,
916 F.2d 903 (3d Cir. 1990) 12, 17, 20, 21, 27

Cited Authorities

Page

In re World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160 (N.D. Cal. 2001) 1, 28

Zschernig v. Miller, 389 U.S. 429 (1968) ..... *passim*

STATUTES

22 U.S.C. §§ 5201-03 26

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2403(b) 1

Cal. Code Civ. Proc. § 354.5 13

Cal. Code Civ. Proc. § 354.6 ..... *passim*

Cal. Ins. Code §§ 13800-07 12

Cal. Stats. 1999, c. 216 § 2 (S.B. 1245) 6, 7, 17

RULES

Fed. R. Civ. P. 12(b)(6) 7

Fed. R. Civ. P. 12(c) 7

U.S. Sup. Ct. R. 14(1)(e)(v) 1

U.S. Sup. Ct. R. 29(4)(c) 1

CONSTITUTIONAL PROVISION

Japan Const. art. 18 17

Cited Authorities

Page

MISCELLANEOUS

Reinhold Billstein, Karola Fings, Anita Kugler and Nicholas Levis, WORKING FOR THE ENEMY: FORD, GENERAL MOTORS, AND FORCED LABOR IN GERMANY DURING THE SECOND WORLD WAR (Berghahn 2001) 18

Edwin Black, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (Crown 2001) 18

Arnold C. Brackman, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987) 5

Martin Crutsinger, *U.S. To Create War Reparation Fund*, ASSOCIATED PRESS ONLINE, May 1, 2000 18

John Friedman, *Hitler's Willing Executives*, THE NATION, May 21, 2001 18

Linda Goetz Holmes, UNJUST ENRICHMENT: HOW JAPAN'S COMPANIES BUILT POSTWAR FORTUNES USING AMERICAN POWS (2001) 5

Ron Grossman, *A Dark History: Did IBM Help The Nazis Tally Their Victims?*, CHICAGO TRIBUNE, Mar. 25, 2001 18

Cited Authorities

Page

Tom Hayden, *Ex-Slave Laborers Deserve Far Better; Holocaust: Rich Firms Get Good Press With Token Payments, But What About the Victims?*, L.A. TIMES, Dec. 30, 1999 18

Joseph Kahn, *U.S. Firms Plan Fund for Victims of Hitler; Move Partly Aimed at Heading Off Lawsuits*, CHICAGO TRIBUNE, Apr. 30, 2000 18

Kyeyong Park, *The Unspeakable Experiences of Korean Women Under Japanese Rule*, 21 WHITTIER L. REV. 567 (2000) 5

Christopher Simpson, THE SPLENDID BLOND BEAST: MONEY, LAW AND GENOCIDE IN THE TWENTIETH CENTURY (New York: Grove Press, 1993) 18

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed January 21, 2003 And Amended March 6, 2003 And Order Of The Court Amending Opinion And Denying Petitions For Rehearing And Rehearing En Banc Dated March 6, 2003 ..... 1a

Appendix B — Order Of The United States District Court For The Northern District Of California Filed September 17, 2001 ..... 42a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *see* Appendix ("Apdx.") A, is reported at 317 F.3d 1005 (9th Cir. 2003) and cited herein as "Slip Op." The relevant opinion of the district court is reprinted at Apdx. B, and reported at *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

JURISDICTION

The court of appeals entered its decision on January 21, 2003, and on March 6, 2003, amended that decision and denied petitions for rehearing and for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Pursuant to Supreme Court Rules 14(1)(e)(v) and 29(4)(c), Petitioners state that the constitutionality of a California state statute is at issue in their Petition and, thus, 28 U.S.C. § 2403(b) may apply. Defendants below notified the Attorney General of the State of California that they challenged the constitutionality of a California state statute and the Attorney General responded by submitting *amici* briefs supporting Petitioners to the district court and the Ninth Circuit in this litigation.

PERTINENT STATUTORY PROVISIONS

The complete text of Cal. Code Civ. Proc. § 354.6 is set forth in full in the Ninth Circuit opinion (Apdx. A), Slip Op. at 10a-12a.

STATEMENT OF THE CASE

Petitioners respectfully suggest that the Ninth Circuit's decision in this case so radically departs from this Court's teachings as to warrant the grant of *certiorari*. Indeed, notwithstanding that since the founding of this United States our courts have had innumerable

opportunities to examine when state action impermissibly interferes with exclusive federal jurisdiction over foreign affairs, and have developed a nuanced jurisprudence to resolve such questions, in this case the Ninth Circuit shoved all that aside and struck out on its own. In doing so, it erred ***and*** unleashed an imprudent new rule capable of great mischief.

At issue here is a California ***procedural*** statute that modified the applicable statute of limitations in suits that might be brought ***by private parties against private parties***. It applies specifically to individuals who were forced to slave for private corporations operating in Japan or Germany during World War II. Section 354.6 of the California Code of Civil Procedure, unanimously enacted by the California Legislature in 1999, allows these former slave-labor victims to assert damage claims under state law against any such corporation that is currently doing business itself or through an affiliate in the State of California.

Under the foreign-affairs jurisprudence developed by this Court and the lower federal courts (*see infra* at 8-16), the California statute does not intrude on federal foreign-affairs powers. Rather, it serves the limited capacity of regulating the conduct of litigation – a power that is well within the traditional province of the states. The mere fact that ***some*** (but not all) of the defendants are foreign (Japanese) corporations does not implicate the foreign-affairs power. Any impact this litigation involving ***private parties*** might have on foreign ***countries*** is far too incidental to warrant a finding of unconstitutionality, especially because it involves the conduct of private companies acting under governmental regimes (and laws) that have long-since disappeared. *See infra* at 16-21.

Although the Ninth Circuit should have applied this sort of foreign-affairs analysis to evaluate the California statute at issue here, it did not. The court paid lip service to the proper analysis, but then declined to employ it, fashioning instead a wholly novel and unprecedented rule that guts any state law addressing a matter somehow "related to war." The court discerned an exclusive federal

power to wage, conclude and avoid wars, and gave this power such sweeping breadth as to encompass much of what others consider to be federal "foreign-affairs" powers. The Ninth Circuit then categorically deemed all matters that somehow relate to these sweeping war powers to be exclusively a federal power. It was then a small step for the court to find that the California statute interfered with this power. *See infra* at 21-28.

But the Ninth Circuit had no basis to bypass the foreign-affairs analysis crafted by this Court and developed by the lower federal courts. Under that analysis – the only legitimate analysis – the California statute is constitutionally valid. This case involves thousands of innocent Korean civilian internees who were the victims of defendants' slave-labor programs and inhumane treatment, and these victims deserve better than the Ninth Circuit's dubious decision. Moreover, although this Court soon will likely be issuing a decision amplifying on the foreign-affairs test,[5] there is no reason to expect that decision to address the Ninth Circuit's novel war-powers rule. Yet the breadth and inflexibility of that new rule promises to make mischief wherever a defendant can challenge a state claim or statute as somehow being "related to war." *See infra* at 28-30. For the reasons stated herein, this Court should grant the petition for writ of *certiorari*.

A. Petitioners were enslaved and treated inhumanely by the defendant private corporations

This case arises from the use of Korean civilians for forced labor by Nippon Steel Corporation, Mitsubishi Heavy Industries, Ltd., Sumitomo Heavy Industries, Ltd., Mitsui and Co., Ltd., Showa Kogyo, and the numerous other private corporations listed *supra* at ii. Petitioners were Korean nationals at the time the alleged wrongs occurred, but are now residents of California

---

5. *American Insurance Ass'n v. Low*, 02-722 ("*Low*") (oral argument held on April 23, 2003).

and Washington. *E.g.*, *Kim* Complaint ¶ 9 (ER 3); *Choe* Complaint ¶ 9 (ER 35).

Petitioners, like thousands of other Korean nationals, were enslaved and forced to work for private corporations during the Second World War. As detailed in the complaints, hundreds of thousands of Koreans were conscripted by Japanese industry and forced to work for little or no pay in unspeakable conditions in mines, factories, construction sites and other industrial settings. They were enslaved, kept under guard in deplorable housing and inadequately fed, and beaten by their industrial captors. *E.g.*, *Kim* Compl. ¶¶ 9, 39-40, 44, 45-55, 57-75 (ER 3, 13, 15-23); *Choe* Compl. ¶¶ 9, 39-40, 44, 45-55, 57-75 (ER 35, 45, 45-55).

The experience of Plaintiff Jae Sik Choe is typical. In 1943, when he was 20 years old, Mr. Choe was duped into traveling to Japan with promises that he would be able to work for a private Japanese company for good wages and in good conditions. Instead, he was shipped first to Yawata Steel Works (now Nippon Steel), and then to Mitsubishi Heavy Industries, where he was starved and forced to work inhumane hours under brutal conditions for little or no wage. At Yawata Steel Works, Mr. Choe was forced to work from sun-up to sundown six days a week with few breaks. He was ordered to bunk in a single large building into which Yawata jammed approximately one thousand steel workers. He was under guard during work and in the lodging. Medical care was bare, and he was given three yen per month – approximately 2 cents in U.S. currency today – for his personal needs. Mr. Choe escaped at one point but, lacking money to return to Korea, was forced to surrender. He was then transferred to a port near Okayama, Japan, where he was again forced into servitude by Mitsubishi Heavy Industries, this time working underground digging a tunnel.

While these allegations must be taken as true on a pleading motion, they are also supported by substantial historical evidence. Historians acknowledge that "700,000 Koreans and 40,000 Chinese . . . were forcibly brought to Japan and sent to work in

factories and mines."[6] An official list identifies more than 50 Japanese companies that used slave labor during World War II.[7] "Almost six million Koreans were drafted as soldiers and/or forced laborers" before and during World War II, "representing approximately twenty percent of Korea's population."[8] Korean historians "estimate that 5.4 million Koreans were forcibly conscripted by the Japanese between 1939 and 1945. Many Koreans were put into coal mines."[9]

B. Nature of the Case and Proceedings Below

Thirty-one cases were consolidated before the district court, each involving claims against private corporations for forced labor and involuntary servitude in Asia during the Second World War. This Petition is filed on behalf of the plaintiffs in four of those cases, which were brought as class actions on behalf of Korean civilian forced-labor victims, and consolidated on appeal by the Ninth Circuit. *See Suk Yoon Kim v. Ishikawajima Heavy Industries, Ltd., et al.*, Nos. 01-17201, *et al.*, Order (9th Cir. Nov. 26, 2001).

Petitioners all were Korean civilians at the time of the wrongs alleged. They are today citizens of the Republic of Korea or are naturalized U.S. citizens residing in Korea, California, and Washington.[10] Defendants are 19 Japanese corporations (and their

---

6. Kyeyong Park, *The Unspeakable Experiences of Korean Women Under Japanese Rule*, 21 WHITTIER L. REV. 567, 572 (2000) (citing Hyun Sook Kim, *History and Memory: The "Comfort Women" Controversy*, 5 Positions 73, 85 (1997)).

7. Linda Goetz Holmes, UNJUST ENRICHMENT: HOW JAPAN'S COMPANIES BUILT POSTWAR FORTUNES USING AMERICAN POWS, 149 (2001).

8. Park, *supra*, 21 WHITTIER L. REV. at 579.

9. Arnold C. Brackman, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS, 253 n. (1987).

10. Plaintiff Suk Yoon Kim was a Korean civilian and today is a resident of California. Plaintiffs Jae Sik Choe and Sa Son "Sindo" Sin were Korean civilians, and today are residents of the State of Washington. Plaintiffs Do Geun Oh, Eung Chang Lee and Yong Hae Lee are both citizens and residents of the Republic of Korea.

U.S. subsidiaries) doing business in California that forced Petitioners and other Korean civilians to work as forced laborers.

These are private lawsuits, brought by private plaintiffs, against private businesses, for universally condemned wrongs. Petitioners do ***not*** seek "war reparations" or any other damages or relief from the government of Japan – or from any governmental agency of Japan. They instead seek compensatory damages and restitution only from the private entities that enslaved them and other Korean civilians – corporations with a substantial presence in the State of California.

Concerned that courthouse doors were being closed to aging victims of World War II-era slave labor, in 1999 the California Legislature enacted Cal. Code Civ. Proc. ("C.C.P.") § 354.6, to provide that any World War II "slave labor" or "forced labor victim" may "bring an action to recover compensation" from any "entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate," provided the action is filed by December 31, 2010. C.C.P. § 354.6 (set forth fully in Apdx. at 11a-12a). That statute provides the focus of this appeal.

Subsection (b) of § 354.6 provides that forced-labor victims (as defined in § 354.6(a)), or their heirs, "may bring an action to recover compensation for labor performed, . . . from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate" – *i.e.*, business corporations – in any "superior court of this state, which court shall have jurisdiction over that action until its completion or resolution." C.C.P. § 354.6(b). Subsection (c) provides, "[a]ny action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitations, if the action is commenced on or before December 31, 2010." C.C.P. § 354.6(c).

The California Legislative Counsel's Digest to the bill that became § 354.6 noted that "[e]xisting law authorizes actions to recover wages but requires various actions to be brought within specified periods of time." Cal. S.B. 1245 at 1 Legislative Counsel's

Digest (Feb. 26, 1999). Viewing the statute as ***procedural*** in character, the California Legislature placed it in the Code of Civil Procedure under Title Two: Time of Commencing Civil Actions, Chapter 4: General Provisions as to the Time of Commencing Actions. *See* C.C.P. Title II, Ch. 4, § 354.6.

The "Statutory Notes" accompanying § 354.6 explain that the Legislature's purpose was to extend any statutes of limitation on World War II forced-labor claims, so that victims might get a hearing on claims against firms presently doing business in California that used forced labor as the basis for their current wealth. "These victims of Nazi persecution," thousands of California residents among them, "have been deprived of their entitlement to compensation for their labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War." Cal. Stats. 1999, c.216 § 1(a)-(b) (S.B. 1245) (codified as notes to C.C.P. § 354.6). Those individuals should be "given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War." *Id.* § 1(c). "To the extent that the statute of limitations applicable to claims for compensation is extended by this act," the Notes continue, "that extension of the limitations period is intended to be applied retroactively, irrespective of whether the claims were otherwise barred by any applicable statute of limitations under any provision of law prior to the enactment of this act." *Id.* § 1(d).

Petitioners, as victims of World War II-era forced labor, filed suits that are timely under § 354.6, asserting state-law claims against the companies that had enslaved them and profited from their labor.

The district court dismissed all of Petitioners' claims on defendants' motions to dismiss and for judgment on the pleadings under Fed. R. Civ. P. 12(b)(6) and 12(c). Judge Walker of the Northern District of California acknowledged that Petitioners alleged valid torts, held that "forced labor violates the law of nations," and stated that it was "beyond doubt that the forced labor practices of defendants during the Second World War violated traditional international law." Apdx. at 77a. Noting that the Republic of Korea

was not a signatory to the Allied Powers' 1951 Treaty of Peace with Japan, he held that the "plain text" of the Treaty cannot bar their claims, and that American foreign policy, as reflected in the Treaty, neither preempts nor conflicts with the California statute and "does not trump the California law." Apdx. at 52a.

Nonetheless, Judge Walker ruled § 354.6's extension of the time to sue unconstitutional – on the ground that it infringes upon the foreign-affairs power of the United States, a rarely invoked and ill-defined implied-preemption doctrine. Judge Walker did so based on his interpretation of *Zschernig v. Miller*, 389 U.S. 429 (1968), the first, and only, case in which this Court applied foreign-affairs preemption to invalidate a state law. Having ruled § 354.6 unconstitutional, Judge Walker then held Petitioners' state-law claims all "barred by the applicable statutes of limitations." Apdx. at 82a.

The Ninth Circuit affirmed the district court's dismissal. Although Petitioners are private parties suing private corporations under well-established California law, the Ninth Circuit found that their claims were constitutionally infirm for interfering with exclusive federal power to make and resolve war. As a result, the appellate court found Petitioners' claims preempted by the "Foreign Affairs Power." Slip Op., Apdx. at 20a-28a.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's New "War Powers" Rule Is A Radical Expansion of The "Foreign Affairs" Doctrine And An Unprecedented Intrusion On State's Rights

The Ninth Circuit held that "Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states," both for creating a state right of action and for extending the limitations period to resurrect otherwise stale claims. Slip Op., Apdx. at 32a. The court ruled that California laws – whether C.C.P. § 354.6 itself or other common-law claims – that would provide hope for relief to wartime victims of slavery or forced labor constitute an unconstitutional interference with federal power over foreign affairs and all matters relating to war. But granting access to California

courts to victims (including California residents) of foreign corporations' slave- or forced-labor programs does not tread on federal authority.

1. A state can allow private claims against a local corporation for misconduct committed by a foreign affiliate without intruding on federal authority over foreign affairs

a. Under this Court's decisions, the foreign-affairs doctrine is rarely invoked to invalidate state action

The foreign-affairs doctrine would not block state-law claims against a private corporation doing business in the forum state for unpaid wages or tortious acts arising from misconduct committed by that corporation or its affiliate in another country. Such a case would not run afoul of the federal government's constitutional authority over foreign affairs. The rarely invoked doctrine of foreign-affairs preemption is a "dormant preemption" doctrine that courts have implied from the federal government's constitutional authority to enter into treaties and otherwise conduct foreign affairs. *Gerling Global Reinsurance Corp. v. Low*, 240 F.3d 739, 751 n.9 (9th Cir. 2001), *cert. petition granted sub nom, Am. Ins. Ass'n v. Low*, 154 L. Ed. 2d 768, 123 S. Ct. 817 (2003). "The power is rarely invoked by the courts; the Supreme Court has not applied it in more than 30 years." 240 F.3d at 751. Importantly, before the present litigation, ***no court has applied the doctrine to dismiss a private plaintiff's state-law claim for tortious misconduct.*** This Court has applied it sparingly, employing it only once to invalidate a state probate law. *See Zschernig v. Miller*, 389 U.S. 429 (1968); *see* Slip Op., Apdx. at 19a; *Int'l Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9th Cir. 1998) (*Zschernig* was "[t]he only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power"), *rev'd on other grounds, sub nom.*, 529 U.S. 89 (2000).

In *Zschernig*, this Court held that an Oregon probate law allowing foreign citizens to inherit from a decedent's estate only if

U.S. citizens could inherit from decedent's estate in a foreign citizen's country violated the "foreign affairs" power because, as applied, it allowed Oregon state court judges to insult foreign nations and conduct detailed inquiries into those nations' laws and their governments' administrations. 389 U.S. at 433-35. As the Ninth Circuit observed in this case, the test under the foreign-affairs doctrine set forth in *Zschernig* and its predecessor is that

> a statute does not violate the constitution where it merely has "some incidental or indirect effect in foreign countries."

Slip Op., Apdx. at 18a-19a (citing *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

The Oregon probate law failed this test in *Zschernig* because it had the proscribed direct effect on foreign countries. Under it and similar state laws passed elsewhere during the Cold War era, state probate courts had

> launched inquiries into the type of governments that obtain in particular foreign nations – whether aliens under their law have enforceable rights, whether the so-called 'rights' are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

Zschernig, 389 U.S. at 433-34. Accordingly, *Zschernig* reasoned, the ensuing probate decisions "radiate some of the attitudes of the 'cold war,' where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory." *Id.* at 435.

The Oregon courts, applying that state's probate law, had opened "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds

should 'not preclude wonderment as to how many may have been denied "the right to receive". . . .'" *Id.* As a result, this Court continued,

> As one reads the Oregon decisions, it seems that . . . the freezing or thawing of the "cold war," and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts. [*Id.* at 437-38 (footnote omitted).]

Because only the federal government, and not the states, may determine whether, when, and how to coerce another nation to change its laws and policies, *Zschernig* concluded that the Oregon probate law, as applied, went too far.

By contrast, this Court held in *Clark v. Allen*, 331 U.S. 503, 517 (1947), that a California probate law with a similar reciprocity provision did not, on its face, violate the U.S. Constitution because the statute had only "some incidental or indirect effect in foreign countries." In that case, a California resident, within weeks of the December 1941 declaration of war on Germany, bequeathed her entire estate to relatives who were German nationals, as permitted by a California state law that predated the Second World War. Several disaffected family members challenged the will. Then the Alien Property Custodian impounded the estate in 1943 pursuant to the Trading With the Enemy Act and sought a determination that his interest in the estate was superior to that of the executor and other potential heirs. The Court responded to the claim that the California statute "is an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government." 331 U.S. at 516. Observing that California law determined rights of succession of property and that the California statute was neither preempted by "different or conflicting arrangements" at the federal level or treaties with another country, this Court held that the statute did ***not*** impermissibly intrude into the field of foreign affairs:

> [w]hat California has done will have some incidental or indirect effect in foreign countries. But that is true of

many state laws which none would claim cross the forbidden line. [*Id.* at 517.]

b. Under *Clark* and *Zschernig*, the lower federal courts only invalidate state laws that coerce a specific foreign government

Applying the analysis formulated by this Court in *Clark* and *Zschernig*, the lower federal courts have not invalidated ***any*** state law not directed against a particular foreign government under the foreign-affairs doctrine. For example, in *Trojan Tech. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), a Canadian corporation argued that a Pennsylvania "Buy American" law violated the "foreign affairs" power. The Third Circuit held that the statute did not violate the "foreign affairs" power, reasoning that "any state law that involves the state in the ***actual conduct of foreign affairs*** is unconstitutional," but "any action that has only ***some incidental or indirect effect*** in foreign countries" is not. *Id.* at 913 (quoting *United States v. Pink*, 315 U.S. 203, 233 (1942), and *Zschernig*, 389 U.S. at 432) (emphasis added, internal quotation marks omitted)). The court stated that Pennsylvania's "Buy American" statute "exhibits none of the dangers attendant on the [Oregon probate statute] reviewed" in *Zschernig* because the statute provided no opportunity for Pennsylvania state officials to comment on the nature of foreign regimes. On its face, the Pennsylvania statute did not single out any particular foreign country; there was no evidence that the statute had been applied selectively according to attitudes concerning foreign policy; and there was evidence that Congress had recently directed its attention to "Buy American" statutes, but took no steps to preempt them. 916 F.2d at 913-14.

Likewise, in *Gerling v. Low*, 240 F.3d at 751, the Ninth Circuit applied *Zschernig* to vacate a district court injunction barring enforcement of California's Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§ 13800-07. HVIRA, like Code Civ. Proc. § 354.6, was part of the California legislative scheme addressing unresolved injuries arising in the years just before and

during the Second World War.[11] While § 354.6 focused on the use of slave labor under "the Nazi regime, its allies and sympathizers," HVIRA addressed insurance companies' refusal to pay to survivors the proceeds of Nazi-era policies sold to Jewish Europeans. *See Gerling*, 240 F.3d at 742-43. Under HVIRA, companies that sold insurance policies in Europe from 1929-1945 were required to file information about those policies with the California Insurance Commissioner. *See id.* The intent of HVIRA, as well as Code Civ. Proc. § 354.6, was to right World War II-era wrongs. According to *Gerling*, "by enacting HVIRA, California's legislature intended to help California residents recover on unpaid policies that were entered into in foreign countries" and "protect its residents from insurance companies that have not paid valid insurance claims." *Id.* at 745. In that statutory scheme, as here, California established a means for victims to recover compensation for World War II-era injustices. *See id.*[12]

A California district court in *Gerling* enjoined enforcement of HVIRA, ruling that it "violates the federal government's power over foreign affairs" because it "has the potential to 'disrupt and embarrass' the federal government in the field of foreign relations." *Id.* at 751 (quoting district court's opinion). The district court looked to this Court's decision in *Zschernig* in ruling that HVIRA's focus

---

11. Cal. Code Civ. Proc. § 354.5, enacted at the same time as HVIRA, allows persons to bring claims for the payment of World War II Holocaust era insurance policies and extends the statute of limitations on such claims until Dec. 31, 2010. In *Gerling*, the California Commissioner of Insurance filed a motion to dismiss, arguing that the insurers did not have standing to challenge § 354.5; the district court agreed, holding that the insurers had not established an imminent threat of prosecution under that statute. On appeal to the Ninth Circuit, the insurers did not challenge that ruling. 240 F.3d at 743.

12. Further, as in § 354.6, the California Legislature also extended the limitations period for filing claims to recover on unpaid policies and authorized the state to suspend licenses of companies that did not pay Holocaust-era claims. Those provisions were not before the court in *Gerling*. *See id.*

on providing relief for Holocaust victims asserted an "exercise [of] a power exclusively entrusted to the national government," which "not only affects international relations, but also has 'great potential for disruption or embarrassment.'" *Gerling Global Reinsurance Corp. of Am. v. Quackenbush*, 2000 U.S. Dist. Lexis 8815, at *21, *27 (E.D. Cal. June 9, 2000), *rev'd in pertinent part*, 240 F.2d 739 (9th Cir. 2001). It could only do so, according to the district court, by meddling with ongoing negotiations being carried out by the U.S. State Department and a U.S.-Swiss Joint Economic Commission addressing the same Holocaust-insurance issue. *See id.* at *27. The district court also found that HVIRA might conflict with German law and was "inconsistent with several of the national government's statements, policies, and promises." *Id.* at *35. Citing *Zschernig*, the district court held that it was probable HVIRA violated the federal foreign-affairs power. *Id.* at *43.

The Ninth Circuit reversed the California district court's decision invalidating HVIRA. It "disagree[d] as a matter of law," holding that the district court "erred when it decided that HVIRA violates . . . the foreign affairs power." *Gerling*, 240 F.3d at 751, 754. The Ninth Circuit was "not persuaded that *Zschernig* applies to HVIRA," reasoning that in *Zschernig*, the Oregon statute "violated the foreign affairs power because, ***as applied***, it allowed Oregon judges to insult foreign nations." *Id.* at 753 (emphasis in original). But HVIRA had no history of improper application, nor did it require qualitative evaluations of foreign governments' laws or policies. Nor did it target any particular country. *Id.* In *Gerling*, the Ninth Circuit also rejected the argument that HVIRA interfered with the federal government's ability to "speak with one voice." 240 F.3d at 746 (citing *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329-30 (1994)). The Ninth Circuit also stated that HVIRA does not even target governmental entities:

> HVIRA regulates insurance companies that do business in California and are, or are related to, companies that issued Holocaust-era insurance policies. No Plaintiff is

> a foreign government, nor is any Plaintiff owned in whole or in part by a foreign government; they are, simply, businesses. [*Id.* at 753.]

The Ninth Circuit concluded that "[b]ecause *Zschernig* has been applied so sparingly, . . . we hesitate to apply *Zschernig* to a facial challenge to state statutes involving 'foreign affairs' (a) but that mainly involve foreign commerce and (b) that are not directed at a particular country." *Id.* Federal power over foreign affairs, a interpreted by *Zschernig*, did not invalidate the statute. *Id.*

By contrast, state statutes that specifically target a foreign government have been invalidated in decisions relying on *Zschernig* and federal power over foreign affairs. For example, the First Circuit applied *Zschernig* to strike a state law – the "Massachusetts Burma Law" – that specifically targeted one country and its government. *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd on other grounds sub nom., Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). The Massachusetts Burma Law was designed to coerce Burma[13] to change its domestic policy by barring state agencies in the U.S. from purchasing goods from companies that did business with Burma. On its face, the Massachusetts statute directly regulated current American trade with Burma in order to exert pressure on the Burmese government. 181 F.3d at 50. But even then, reflecting how sparingly this Court has employed the foreign-affairs preemption, this Court did ***not*** address the circuit court's foreign-affairs analysis on certiorari, affirming instead on other grounds. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000); *see Gerling v. Low*, 240 F.3d at 752 (noting that in *Crosby*, the Supreme Court "did not rule on the foreign affairs question").

Likewise, in *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1367 (D.N.M. 1980), in an effort to retaliate against the regime that had taken control of Iran for the then-ongoing Iranian

---

13. Although Burma changed its name in 1989 to Myanmar, the *Natsios* parties, court and the state statute used its previous name. 181 F.3d at 45 n.1.

hostage crisis, a state university took steps to "to rid the campus of Iranian students." As in *Natsios*, the state's aim was to coerce an existing foreign government and, in so doing, it interfered with federal efforts to resolve the international dispute and obtain the hostages' release. *Id.* at 1376, 1378-79.

Finally, two state courts have invalidated laws that restricted commerce with the Republic of South Africa in order to discourage that country's policy of apartheid. In *Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill. 2d 221, 503 N.E.2d 300, 307 (1986), the Illinois Supreme Court struck down a discriminatory tax on coins imported from South Africa, and in *New York Times Co. v. New York Comm'n on Human Rights*, 41 N.Y.2d 345, 361 N.E.2d. 963, 968 (1977), the court invalidated a New York City Commission ruling that prohibited publication of employment advertisements about South Africa. These courts found that state laws imposing embargoes interfered with ongoing trade relations and were designed to coerce the government of a single country, South Africa, to change its policies. *Johnson*, 503 N.E.2d at 307; *New York Times*, 361 N.E.2d at 968-69.

c. Section 354.6 coerces no foreign government and seeks relief only for private misconduct

Code Civ. Proc.§ 354.6, by contrast, encompasses none of the several features of various states' laws that have triggered foreign-affair preemption in other cases. Unlike the Oregon probate statute reviewed by this Court in *Zschernig*, § 354.6 does not require or encourage the California state courts to investigate or evaluate the laws or policies of any foreign government. The statute provides no mechanism for state courts to coerce foreign governments to change current or future policies.

Instead, § 354.6 is strictly retrospective, ***applying in this case to address injuries committed by private actors under World War II-era governments or political regimes that no longer exist***. The California statute authorizes no inquiry into the government of any foreign nation. Nor does it – or this suit – target any

government's current policies. Indeed, Japan's current constitution condemns slavery,[14] and Petitioners certainly do not seek to change that with their lawsuits. These actions seeking to recover damages have little, if anything, to do with Japan's government, which is not a defendant, or its policies, which are not in issue.[15]

Nor does § 354.6 target any particular country, another key factor in applying the foreign-affairs preemption. Like the statutes at issue in *Trojan* and *Gerling*, which did "not refer to any particular country," *Trojan*, 916 F.2d at 913-14; *Gerling*, 240 F.3d at 753, § 354.6 does not focus on any single country. If anything, § 354.6 sweeps wider than HVIRA – which narrowly targets the Nazis' European victims only. *See Gerling*, 240 F.3d at 742-43. Section 354.6, by contrast, encompasses ***all*** slave and forced-labor victims under "the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." C.C.P. § 354.6(a)(2). This provision permits legal actions to be brought against any company, incorporated ***anywhere***, that has sufficient contacts with the State of California and used slave labor or forced labor in covered countries.

---

14. Japan Const. art. 18, provides: "[n]o person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited."

15. Any question of whether § 354.6 might be found unconstitutional in another context, such as in an action naming the Japanese, German, Italian, or other governments as defendants, does not invoke preemption ***in this case*** against private corporations. Again, the defendants in these cases are "firms presently doing business in California" that used World War II-era slave or forced labor that "served as the basis of ill-gotten wealth." Cal. Stats. 1999, c.216 § 2 (S.B. 1245) (codified as a note to § 354.6). Petitioners name no governmental entity – past or present – as a defendant. As in *Gerling*, it is significant here that "[n]o Plaintiff is a foreign government, nor is any Plaintiff owned in whole or in part by a foreign government; they are, simply, businesses." 240 F.3d at 753.

Indeed, even American companies doing business in California could be sued under § 354.6 if they used forced labor under the conditions set forth in the statute. For example, the Ford Motor Company has admitted that its German subsidiary used slave labor in the 1940s. *See* Martin Crutsinger, *U.S. To Create War Reparation Fund*, ASSOCIATED PRESS ONLINE, May 1, 2000. Also during World War II, General Motors, through its Opel subsidiary, forced thousands of slave laborers to manufacture trucks and aircraft used by the German military. *Id.* Coca-Cola, Exxon-Mobil and Kodak are also "among a growing number of American multinationals that say they have found evidence that their subsidiaries used forced labor" in Europe during the World War II era.[16] Thus, contrary to the Ninth Circuit's conclusion in this case, § 354.6 cannot be said to single out any particular country.

Next, § 354.6, as applied to Petitioners' claims, seek damages only from ***private actors*** that conduct business in California. Defendants are private companies that operated mines and shipyards, made cement, and manufactured munitions and armaments during the Second World War. In Mr. Kim's case, for example, defendants were private heavy-equipment manufacturers that operated shipyards where he was forced to work. The fact that

---

16. Joseph Kahn, *U.S. Firms Plan Fund for Victims of Hitler; Move Partly Aimed at Heading Off Lawsuits*, CHICAGO TRIBUNE, Apr. 30, 2000, at C11. *See generally* John Friedman, *Hitler's Willing Executives*, THE NATION, May 21, 2001, at 40 (book reviews); Ron Grossman, *A Dark History: Did IBM Help The Nazis Tally Their Victims?*, CHICAGO TRIBUNE, Mar. 25, 2001, at C5 (book review); Reinhold Billstein, Karola Fings, Anita Kugler and Nicholas Levis, WORKING FOR THE ENEMY: FORD, GENERAL MOTORS, AND FORCED LABOR IN GERMANY DURING THE SECOND WORLD WAR (Berghahn 2001); Edwin Black, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (Crown 2001); Christopher Simpson, THE SPLENDID BLOND BEAST: MONEY, LAW AND GENOCIDE IN THE TWENTIETH CENTURY (New York: Grove Press, 1993); Tom Hayden, *Ex-Slave Laborers Deserve Far Better; Holocaust: Rich Firms Get Good Press With Token Payments, But What About the Victims?*, L.A. TIMES, Dec. 30, 1999, at B11.

these private companies' violations of law were committed during wartime does not somehow transform it into state action. Governments prosecute wars pursuant to their inherent wartime powers. Private companies do not, however, and instead must conform their business activities to the wartime demands of their government. See, for example, *Highland v. Russell Car & Snow Plow Co.*, 279 U.S. 253, 262 (1929) (government could impose price on private companies for fuel as alternative to expropriation in support of war effort); *Brown v. Wright*, 137 F.2d 484, 489 (4th Cir. 1943) (wartime price controls were legitimate exercise of government's war powers).

Moreover, in *Kawakita v. United States*, 343 U.S. 717, 727-28 (1952), this Court held that private Japanese companies retained their status as profit-making ventures during World War II. *Kawakita* affirmed the treason conviction of a U.S. citizen who, while living in Japan during World War II, served as an interpreter for a private Japanese company and mistreated American POWs whom that company was using as slave laborers. In his defense, Kawakita asserted that he had renounced his citizenship before committing the acts in question, which provided aid and comfort to the Japanese war effort. As evidence of his renouncement, Kawakita cited his work as an interpreter for a private Japanese company that was supporting the Japanese government's war effort and that used American POW labor, claiming that this Court should deem this work as being performed for the Japanese government. This Court declined to do so, instead confirming that a private business remains so, notwithstanding wartime circumstances, unless the government seizes the company:

> The regulation of the company by the Japanese government, the freezing of its labor force, the assignment to it of prisoners of war under military command were incidents of a war economy. But we find no indication that the Oeyama Company was nationalized or its properties seized and operated by the government. ***The evidence indicates that it was***

> ***a part of a regimented industry; but it was an organization operating for private profit under private management.*** [*Id.* (emphasis added).]

Kawakita applies here as well. No private corporation named as a defendant in Petitioners' actions argues that the wartime government of Japan nationalized it or seized and controlled its assets before or during World War II. None of these corporations disputes that it continued to operate as a private entity during the Second World War. Accordingly, in their lawsuits Petitioners seek to recover damages only for the misconduct of ***private*** actors. No actions of the Japanese government – past or present – is at issue in these cases.

Further, even though the present Japanese government may be displeased that Japanese corporations doing business in California may be held to account under California law for past misdeeds, no authority holds that this displeasure is a matter of "foreign relations" rendering the California law constitutionally infirm. *Zschernig* held that the mere "possibility that any holding may disturb a foreign nation – whether the matter involves commercial cases, tort cases, or some other type of controversy," ***does not preclude a state court from applying the law and passing judgment***. 389 U.S. at 433; *see also id.* at 461 (Harlan J., concurring). Indeed, if the fact that a foreign government might be "disturbed" whenever one of its country's corporations is sued in the U.S. triggered foreign-affairs preemption, then any state law or regulation with some extraterritorial economic impact would be at risk. Such a construction would radically shift the balance between the states and federal government, stripping states of the power to make laws that have any foreign impact.

The better rule was stated by this Court in *Clark* and *Zschernig*, and echoed by the circuit courts in *Trojan* and *Gerling*, namely, that while it is true that "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional," "any action that has only ***some incidental or indirect effect*** in foreign countries" does not intrude on the foreign-relations power. *Zschernig*, 389

U.S. at 432 (emphasis added); *see also Trojan*, 916 F.2d at 913; *Gerling*, 240 F.3d at 752; *see supra* at 12. Even if § 354.6 may have some "incidental or indirect effect" in Japan, like the state statutes at issue in *Trojan* and *Gerling*, it does ***not*** involve the State of California in the actual conduct of foreign affairs. As in *Gerling*, § 354.6 involves mainly business corporations and commerce, and the California statute is not directed at a particular foreign country. As in *Trojan* and *Gerling*, this Court's decision in *Zschernig* does not invalidate the statute.

Also, as in *Trojan* and *Gerling*, § 354.6 has no history of abuse by California state-court judges, unlike the Oregon probate statute invalidated in *Zschernig*. In cases brought by Korean and Chinese slave labor victims that are pending in the California state courts, no state trial or appellate court judge has used § 354.6 to impugn Japan, or any other foreign government for that matter. Nothing on the statute's face suggests that any judge will do so.

In short, like the HVIRA statute at issue in *Gerling v. Low*, Petitioners assert damage claims against private businesses – the ones that forced them to work and do so under atrocious conditions – for unpaid wages and other relief. Targeting only those businesses that now conduct multi-million dollar operations in California with the profits they derived from using slave and forced labor during World War II, § 354.6 simply does not seek to regulate foreign trade. Neither does it implicate current foreign policy or target any acts of the current government of Japan. Only defendants' acts as private businesses are at issue in these cases, and any judgment entered against them will stem from those acts ***only***. Therefore, Petitioners' claims do not interfere with federal power on foreign affairs.

2. The wartime context of Petitioners' state-law claims does not render them unconstitutional

Notwithstanding these undisputed predicate facts, the Ninth Circuit held that the California statute is constitutionally infirm for intruding on federal power over foreign affairs because the defendant corporations' misconduct occurred during wartime. The court did not, however, directly affirm the district court's conclusion that

§ 354.6 violates federal authority over foreign affairs. Although this issue dominated the parties' briefing before the Ninth Circuit on the consolidated appeals, the court sidestepped it. Slip Op., Apdx. at 22a-23a. The Ninth Circuit held instead that the fact that the corporations' alleged misconduct occurred during wartime invoked a particularly potent facet of the federal government's foreign-affairs powers – the "power to make and resolve war, including the procedure for resolving war claims." Slip Op., Apdx. at 23a. According to the court, this war power "is central to the foreign affairs power in the constitutional design." *Id.* at 26a. The Ninth Circuit further decreed that only the federal government can address "[m]atters related to war," and that C.C.P. § 354.6 breached this rule. *Id.* at 22a. The Ninth Circuit erred by substituting this unprecedented, rigid rule in place of this Court's long-standing and nuanced foreign-affairs analysis.

a. The Ninth Circuit wrongly displaced this Court's foreign-affairs analysis to find that Section 354.6 intruded on foreign affairs

While paying lip service to this Court's well-settled foreign-affairs analysis, the Ninth Circuit affirmed the district court's dismissal of these cases via a two-step sleight of hand that substituted edict for analysis. First, it identified a war-powers component to federal foreign-affairs authority and gave it an expansive definition. Second, the Ninth Circuit refused to conduct any further analysis because, as it proclaimed, the states simply cannot address any matter that "relates to war." Section 354.6, the court continued, "relates to war" and, thus, improperly intrudes on federal war powers. In other words, the Ninth Circuit concocted an "exception that swallows the rule." Without a shred of supporting authority, it benched this Court's nuanced foreign-affairs analysis and substituted its own rigid rule. This is manifest error in need of correction by this Court.

The Ninth Circuit achieved this erroneous result in the following manner. First, the court surveyed the pertinent foreign-affairs doctrine analysis, but it then declined to rule on that basis: "Although we agree that [§] 354.6 violates the foreign affairs power, we base our

holding on a narrower consideration." Slip Op., Apdx. at 23a. The court chose an alternative grounds based on federal war powers:

> We hold that [§] 354.6 is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims. [*Id.*]

According to the Ninth Circuit, this federal power to make and resolve wars emanates from – indeed, is "central to" – federal foreign-affairs powers. *Id.* at 26a. *See also id.* at 21a ("matters concerning war are part of the inner core of this [foreign relations] power").

Significantly, the Ninth Circuit also recast much of the federal ***foreign-affairs*** powers as ***war*** powers. *See id.* at 21a. The court described its view of the sweeping breadth of the federal war powers – a "power" ***not*** specified in the U.S. Constitution but, instead, derived by the court apparently from a "penumbra" of powers that are supposedly expressly and exclusively granted to the federal government. *See id.* After listing federal powers relating to war actually identified in the Constitution, the Ninth Circuit then extended its reach to ***other*** matters:

> Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to ***prevent*** war. . . . Thus the inheritance provision at issue in *Zschernig*, although superficially unrelated to war, was seen by a Court operating at the height of the Cold War as a potential provocation to foreign powers. [*Id.* (emphasis in original).]

The Ninth Circuit next assumed – without analysis or citation to precedent – that ***all*** wartime lawsuits categorically involve war powers (and, hence, foreign affairs) ***and*** that the states cannot address any sort of wartime dispute:

> Matters related to war are for the federal government alone to address. [*Id.* at 22a.]

But in making this sweeping declaration, the Ninth Circuit ignored this Court's nuanced test for evaluating whether a particular state action or statute involves foreign affairs. This applicable test, as shown above, conclusively establishes that § 354.6 does ***not*** involve foreign affairs. *See supra* at 9-21. Instead, the Ninth Circuit simply proclaimed that ***all*** "matters related to war" involve foreign affairs. It labeled § 354.6 an effort by the California legislature to "create . . . a remedy for wartime acts." Slip Op., Apdx. at 23a. Thus, or so the Ninth Circuit held, it is "related to war."

The court allowed one exception to this rigid new rule, namely, that states may act on matters relating to foreign affairs when expressly authorized by the federal government:

> In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes. [*Id.* at 26a.]

The Ninth Circuit then affirmed dismissal of Petitioners' state-law claims on the ground that states cannot exercise any foreign-affairs power – that is, according to the court below, they cannot even establish a forum to litigate claims arising from tortious acts committed during wartime – absent specific federal authorization, which the California Legislature lacked in this case. *Id.* at 27a-28a.

The fatal flaw in this reasoning is the Ninth Circuit's ***premise that § 354.6 is a proscribed exercise of foreign-affairs powers by a state***. As set forth above, § 354.6 as applied here is ***not*** an exercise of foreign-affairs powers under the established test stated by this Court in *Clark/Zschernig* and employed by the lower federal courts. Tellingly, in this case the Ninth Circuit declined to address whether § 354.6 is an improper state exercise of foreign affairs under *Clark/Zschernig*. *See* Slip Op., Apdx. at 23a; *supra* at 22. Unlike *Gerling*, where the Ninth Circuit applied the *Clark/Zschernig* test to find that a related California Holocaust victims' statute did not intrude on foreign affairs – notwithstanding the fact

that the statute in question plainly "related to war" – nowhere in the present decision did the Ninth Circuit even attempt to apply the test to Petitioners' claims for damages. Instead, the court below conjured a novel analysis, which employed none of the *Clark/Zschernig* factors nor derived from any prior authority, to conclude that § 354.6 intruded into foreign affairs. The Ninth Circuit then found that the statute did so without authorization from U.S. treaties resolving World War II-era disputes. *E.g.*, Slip Op., Apdx. at 26a ("[n]o party argues that any of these agreements provides the authority for a state of the United States to create a private right of action enabling individuals to recover for wartime injuries").

Given the Ninth Circuit's view that (i) federal war powers are so broad as to sweep up much of federal foreign-affairs powers, and (ii) "all things related to war" are beyond the reach of any state, the Ninth Circuit's decision is dangerously removed from all foreign-affairs precedent. In other words, in this case the Ninth Circuit has swept away this Court's decisions in *Clark* and *Zschernig* and their lower federal-court progeny, and replaced them with an untested edict that ***all*** "matters related to war" are foreign-affairs issues "for the federal government alone to address."

This sweeping extension of the federal foreign-affairs powers to all things "related to war" is unprecedented and contrary to precedent. Victims of wartime tortious misconduct committed in foreign lands can, in fact, assert claims arising under state law against the perpetrators. In *Linder v. Portocarrero*, 963 F.2d 332, 333 (11th Cir. 1992), for example, the surviving family members of an American citizen who was tortured and killed in Nicaragua by Nicaraguan anti-government military forces ("Contras") sued the individuals allegedly responsible, as well as three Contra organizations. Plaintiffs asserted various claims under Florida state law for wrongful death, torture and intentional infliction of emotional distress. *Id.* at 334. The Eleventh Circuit rejected defendants' contention that no liability could stem from tortious conduct occurring during war, *id.* at 336, even though the Executive Branch of the U.S. Government was actively, though covertly, supporting the

Contras in their war against the Nicaraguan government.[17] Though covert and undeclared, the U.S. Government's war-by-proxy against the Nicaraguan government would certainly fall within the Ninth Circuit's swollen concept of federal war powers, as pronounced in this case. Under the Ninth Circuit's all-things-related-to-war standard, the *Linder* claims would have been dismissed (improperly so) as an unconstitutional intrusion on federal war powers.

So too would have been the state-law claims asserted against the Palestine Liberation Organization ("PLO") in *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44 (2d Cir. 1991).[18] The U.S. Government had deemed the PLO a terrorist organization under the Anti-Terrorism Act (22 U.S.C. §§ 5201-03), *see* 937 F.2d at 46, which could also fall within federal war powers, as described by the court of appeals in this case. The plaintiffs were a survivor of and the estate of Leon Klinghoffer, an American murdered onboard an Italian cruise ship, the *Achille Lauro*, allegedly by PLO associates. *Klinghoffer*, 937 F.2d at 47. As "related to war," the state-law claims would be unconstitutional under the Ninth Circuit decision. The Second Circuit would have disagreed, however, in light of its characterization of plaintiffs' claims:

> [W]e are faced with an ordinary tort suit, alleging that the defendants breached a duty of care owed to the plaintiffs or their decedents. [*Id.* at 49.[19]]

The Ninth Circuit's new rule would also have altered the foreign-affairs decisions discussed above; indeed, it conflicts with this Court's

17. As a result, the *Linder* plaintiffs sought discovery from the FBI, CIA, Defense and State Departments, the National Security Agency and the Immigration and Naturalization Service. *See Linder v. DOD*, 133 F.3d 17, 20 (D.C. Cir. 1998).

18. The district court noted that plaintiffs asserted claims under state and other law. *See Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, etc.*, 739 F. Supp. 854, 857 (S.D.N.Y. 1990).

19. *Klinghoffer* addressed this statement to whether plaintiffs' claims were non-justiciable political questions. The court found that they were not. *Id.* at 49-50.

rulings in *Clark* and *Zschernig*. The dispute presented in *Clark*, which straddled World War II, plainly "related to war." The dispute arose from property bequeathed to German nationals just days after this nation's declaration of war against Germany. As already described (*supra* at 11), the Alien Property Custodian impounded the estate pursuant to the Trading With the Enemy Act and sought a ruling that he possessed the superior interest in the estate. To resolve the matter, this Court examined federal wartime policies, several treaties and a California probate statute. Notwithstanding the dispute's obvious relationship to "war," this Court disposed of the constitutional challenge to the probate statute via the foreign-affairs test discussed elsewhere (*see supra* at 11-12). It suggested no exception for "matters related to war."

With regard to *Zschernig*, in this case the Ninth Circuit characterized the case as motivated by this Court's concern that the California statute was a "potential provocation" for war. Slip Op., Apdx. at 21a-22a. Yet *Zschernig* applied the *Clark* foreign-affairs analysis and recognized no exception for war-related matters.

The California HVIRA statute that was at issue in *Gerling* (*see supra* at 12-13) likewise concerned Nazi Holocaust victims' claims, and would have been found to constitute an unconstitutional intrusion on federal "war" powers under the Ninth Circuit's ruling here. Even the "Buy American" state law at issue in *Trojan* (*see supra* at 12) could be deemed "related to war" as an effort to sharpen the U.S. economy and war readiness during Cold War tensions. *Cf.*, Slip Op., Apdx. at 21a-22a (characterizing the state probate statute at issue in *Zschernig* as war related). And the district court's foreign-affairs analysis in *Tayyari* (*see supra* at 15-16) would have been superfluous because the court simply could have found that New Mexico's effort to coerce the Iranian regime during the hostage crisis interfered with the U.S. Government's negotiations to avoid war.

But none of these federal courts did so. Despite their case's relationship to "war" (as the Ninth Circuit broadly construed the term), each court applied the foreign-affairs test without recognizing any all-matters-relating-to-war exception. In short, in this case the

Ninth Circuit highjacked the established and nuanced *Clark/Zschernig* foreign-affairs analysis and substituted its inflexible and unprecedented related-to-war rule. This was prejudicial error that requires this Court's attention.

b. The Ninth Circuit wrongly deemed immaterial that the U.S.'s resolution of wartime claims against Japan did not address Korean nationals' claims

Faced with the fact that Korea was not a signatory to any U.S. treaty resolving World War II issues, and that, accordingly, no U.S. treaty stood in the way of Petitioners' effort to pursue wartime forced-labor claims in California courts, the Ninth Circuit simply deemed this fact "immaterial." Slip Op., Apdx. at 28a n.14.[20] The Ninth Circuit instead concluded that no treaty expressly authorized states to provide a forum for private wartime tort claims brought by nationals of Korea, China or anywhere else. Given its rulings that such explicit authorization was required, it was of no import to the court that no treaty precluded California from hearing Petitioners' claims.

Accordingly, if this Court accepts this petition and rejects the Ninth Circuit's war-powers analysis, no treaty would bar a court from hearing Petitioners' claims.

B. The Gravity of Petitioners' Injuries And The Corporate Misconduct Compel Review of The Ninth Circuit's Decision

The severity of Petitioners' injuries and defendants' atrocious conduct alone commend this matter for review. The Ninth Circuit somberly characterized the factual background of these and the 25 other cases that were consolidated before it. According to the court below, these cases concern atrocities committed during World War II by private Japanese and, in one instance, German corporate interests. These private corporations meted out terrible abuses on

---

20. The district court likewise found that no peace treaty signed by the U.S. was intended to or did resolve individual wartime claims of Korean nationals. *See In re World War II Era Japanese Forced Labor Litig.*, Apdx. at 47a-52a.

civilians of Korea, China and other countries, and also on U.S. and Allied soldiers captured by Japanese and German military forces during the Second World War. The private corporations and their managers not only forced countless individuals to work long hours without pay but they also inflicted vicious and inhuman cruelties on them. The slave workers were often underfed, physically beaten, exposed to dangerous conditions and denied medical care; many were murdered and others died as a result of the maltreatment they suffered. Slip Op., Apdx. at 4a.

These forced and slave workers, notwithstanding passage of more than 50 years, have received nothing from the corporate defendants – no back wages, no apology, and no compensation for their often horrific mistreatment. In § 354.6, the California Legislature provided them one last opportunity to wring some measure of justice from their tormentors as compensation, however meager, for the labor, health and dignity that defendants stole from them. The Ninth Circuit's decision, if allowed to stand, forecloses that opportunity, and justice – already delayed – will be forever denied.

C. This Court's Impending *Low* Decision Will Not Address The Ninth Circuit's Error in This Case

Section 354.6 is part of a California legislative initiative to pass statutes attempting to address certain injustices still lingering from the global calamity that was World War II. Another of these statutes has been challenged as unconstitutional intrusion on the federal government's exclusive foreign-affairs powers. HVIRA (*see supra* at 12-13) is currently before this Court in *American Insurance Ass'n v. Low*, 02-722 ("*Low*"), which is an appeal from the Ninth Circuit's *Gerling* decision. This Court heard oral argument in that case on April 23, 2003. The issue presented in that case is the proper test for determining whether a state action intrudes on federal foreign-affairs powers.

What is not at issue in *Low* is the Ninth Circuit's novel all-things-related-to-war rule that the court below devised in the instant case to bypass the *Clark/Zschernig* foreign-affairs analysis.

Irrespective of any refinements that *Low* will likely provide to the *Clark/Zschernig* analysis, *Low* offers no opportunity to address the Ninth Circuit's war-powers exception. Even though the Ninth Circuit stayed its mandate in this case pending the *Low* decision (Slip Op., Apdx. at 41a), *Low* likely will not alter the outcome here.

The Ninth Circuit's war-powers analysis and the decision in these cases plainly warrant review. The decision of the court below is both a novel and a sweeping alteration of existing law. Petitioners have already described its breadth (*see supra* at 23 (citing Slip Op., Apdx. at 21a) and potential for wide application elsewhere (*see supra* at 25-28). It is also novel and inflexible. Notwithstanding its breadth, apparently no court has ever previously recognized a war-powers exception to the existing foreign-affairs analysis – at least the Ninth Circuit cited none and Petitioners' own research has uncovered nothing – despite innumerable opportunities. Indeed, this Court's decision in *Clark* squarely arose from a war context, yet it analyzed the constitutional challenge to the state law strictly as a matter of foreign affairs, not as "related to war." *See supra* at 11, 27.

The rule adopted by the Ninth Circuit in this case is unprecedented, notwithstanding that issues relating to federal authority over foreign affairs – including war – have been matters of judicial concern dating back to the very founding of the Republic. As such, to the extent it displaces the established *Clark/Zschernig* foreign-affairs analysis (and as likely refined by *Low*), it is contrary to law. This sweeping, inflexible rule is capable of great mischief. This Court's review of the Ninth Circuit's decision is essential.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Steve W. Berman
Counsel of Record
Erin K. Flory
Hagens Berman LLP
1301 Fifth Ave., Ste. 2900
Seattle, WA 98101
(206) 623-7292

Kevin P. Roddy
Hagens Berman LLP
700 S. Flower St., Ste. 2940
Los Angeles, CA 90017-4101
(213) 330-7150

Counsel for Petitioners